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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS JUAN MOSQUEDA,

Defendant and Appellant.

C059252

(Super. Ct. No.
06F04317)

Based on information obtained from a confidential informant (CI), Sergei Walton, who died before trial, an undercover drug operation was commenced which resulted in the arrest of defendant Carlos Juan Mosqueda. Following a jury trial, defendant was convicted of numerous drug offenses and in bifurcated proceedings the court found two prior strike allegations true. One of those prior strikes was based on a juvenile adjudication. Defendant appeals contending his confrontation rights were violated by the admission of the then deceased Walton's statements. He also contends the use of his prior juvenile adjudication as a strike violated his due process rights. We affirm.

FACTUAL BACKGROUND

In May 2006, Special Agent Erik Crowder of the Bureau of Alcohol, Tobacco, Firearms and Explosives was investigating Sergei Walton for trafficking in firearms and dealing drugs. Agent Crowder arrested Walton for selling a machine gun, and Walton offered to provide evidence on other drug dealers.

Walton made a number of calls to "Carlos." Agent Crowder was listening in on the calls and could hear both sides of the conversation. He was also recording the conversations. Walton arranged to buy a quarter-pound¹ of methamphetamine for \$3,000 from Carlos. Carlos said he would deliver the drugs to Walton's residence.

Agent Crowder notified local law enforcement about the drug deal, and they sent a surveillance team to defendant's address. At about 7:45 p.m., Detective Kevin Patton saw a Dodge Intrepid pull into the driveway of the house. The driver, an adult Hispanic male, and the passenger, a female, got out of the car and went into the house. No one else came in or out of the house. A couple of hours later, a dark sedan pulled up to the house. Defendant ran out of the house and got into the sedan, which then drove away.

The officers followed the sedan for about 10 minutes. The sedan was pulled over .37 miles away from Walton's house. Defendant's sister was driving and defendant was sitting in the

¹ A quarter-pound of methamphetamine is approximately 120 grams.

front passenger seat. Thomas H., a juvenile was in the backseat.

Defendant initially gave officers a false name, and his sister also tried to hide his identity. Upon searching Thomas H., officers found a baggie with 109 grams of methamphetamine in his waistband and a smaller baggie with 13.6 grams of methamphetamine in his shoe. Defendant was also searched and the officers recovered \$590 in cash in his pockets, mostly in \$20 bills. They also recovered two cell phones from the car. At the scene, Thomas H. told the officers defendant had handed him the methamphetamine when the officers activated their sirens, saying, "Get this, get this. They won't check you because you['re] a kid."

The officers then searched defendant's home and found a digital scale and 48.4 grams of methamphetamine. There was also paperwork in the home connecting defendant to the address and the Dodge Intrepid.

Detective Jason Oliver qualified as an expert in possession of methamphetamine and possession of methamphetamine for sale. He testified that a normal dose of methamphetamine is .1 to .2 grams, costing \$10 or \$20. Normally, a user would keep only two to three grams on them at a time. He further opined, given the quantities of methamphetamine found on Thomas H., and the quantities found in defendant's home combined with the digital scale found at defendant's home, all the methamphetamine was possessed for sale.

PROCEDURAL HISTORY

Defendant was charged with transportation of methamphetamine, furnishing methamphetamine to a minor and two counts of possession of methamphetamine for sale. It was also alleged that the minor was at least four years younger than defendant and two prior strike convictions were alleged. Following a jury trial, defendant was convicted on all counts and the special allegation was found true. In bifurcated proceedings, the court found both prior strike allegations true. One of those priors was based on a juvenile adjudication. Defendant was sentenced to an aggregate term of 25 years to life, plus a consecutive one year eight months.

DISCUSSION

I

Defendant contends the trial court violated his confrontation rights by allowing admission of the transcripts and tape recorded telephone conversations between Carlos and the deceased CI, Walton.

Prior to trial, the prosecution sought admission of the transcript and tape recorded conversations between Walton and Carlos, in which Walton set up a drug buy with Carlos. By the time of trial, Walton was dead and he had never been questioned by defendant. At issue were three recordings of the

conversations listened to and taped by Agent Crowder.² In the first call, Walton left a message telling someone to call him back. In the third call, Walton reached "Carlos," told Carlos he had "three" and Carlos agreed to call someone and get back to Walton. Walton then told Agent Crowder that "three" meant \$3,000. Agent Crowder also testified that although neither Walton nor Carlos was explicit, Walton was indicating to Carlos he wanted to pay \$3,000 for methamphetamine. In the fifth call, only Walton was recorded. In that call, Walton indicated he did not have a car and asked Carlos to come to his home to make the deal for "three." Agent Crowder testified the deal was for Walton to pay \$3,000 for a quarter-pound of methamphetamine.

In *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*), the United States Supreme Court held out-of-court statements, which are testimonial in character, are barred by the Sixth Amendment's confrontation clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Crawford, supra*, 541 U.S. at p. 59.) *Crawford* does not, however, extend to every out-of-court statement. The confrontation clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the

² There were a total of five conversations, but the other two are not relevant to this discussion.

truth of the matter asserted.) [Citation.]” (*Id.* at p. 59, fn. 9.)

Walton was clearly unavailable at the time of trial, due to his death. Thus, whether the confrontation clause was implicated turns on whether his statements were testimonial and offered to prove the truth of the matter asserted. We will assume without deciding that the evidence was testimonial in nature and offered to prove the truth of the matter asserted, we find any error in its admission harmless beyond a reasonable doubt.

A violation of the confrontation clause is subject to harmless error analysis, and the reviewing court should consider several factors in determining whether the error is harmless beyond a reasonable doubt. (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1225.) They include “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” (*Ibid.*)

Here, the defendant was charged with and convicted of two counts of possession for sale, one count of transportation and one count of furnishing methamphetamine to a minor. Defendant was riding in the car with over 100 grams of methamphetamine. Thomas H., a minor, stated at the scene that defendant had given him the methamphetamine to hold because he was a minor and would

not be searched. There was another 48 grams of methamphetamine in defendant's home, as well as a digital scale. The quantities of methamphetamine both in the car and in the home and the possession of a digital scale indicated the methamphetamine was possessed for sale. In addition, both defendant and his sister lied about his identity to police, suggesting a consciousness of guilt on their parts. On its own, this was strong evidence to support defendant's convictions. The pretextual phone calls with Walton mostly provided a framework for understanding why officers stopped defendant in the first place. To the extent they added anything substantive to the evidence, it was on the issue of defendant's intent to sell, a point established by Detective Oliver's testimony. Based on this record, any error in admitting the transcripts and tape recordings of the pretextual calls between Walton and Carlos was harmless beyond a reasonable doubt.

II

Defendant argues that the use of his prior juvenile adjudication to increase his sentence under the "Three Strikes" law violates the United States Supreme Court's holdings *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] because he had no right to a jury trial in the prior juvenile proceeding.

While this appeal was pending, our Supreme Court issued its opinion in *People v. Nguyen* (2009) 46 Cal.4th 1007, holding the right to a jury trial recognized in *Apprendi* "does not . . .

preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person." (*People v. Nguyen, supra*, at p. 1028.) *Nguyen* fully disposes of defendant's second claim of error on appeal. Accordingly, we need not belabor this issue, his sentencing challenge fails.

DISPOSITION

The judgment is affirmed.

_____, J.
NICHOLSON

We concur:

_____, Acting P. J.
BLEASE

_____, J.
CANTIL-SAKAUYE